# Selvakumar a/l Subramaniam v Penguasa Pusat Pemulihan Akhlak, Simpang Renggam, Johor Darul Takzim & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S-21–162 OF 2009
LEE HENG CHEONG JC
29 APRIL 2013

*Constitutional Law — Fundamental liberties — Personal liberty — Whether plaintiff's detention under first detention order ('DO') unlawful and unconstitutional — Whether defendants' actions infringed art 5(1) of the Federal Constitution — Legality of second DO — Whether new charges or new evidence used or relied upon to issue second DO — Whether issue of second DO unlawful and mala fide — Federal Constitution arts 5, 7 & 151 — Public Order and Prevention of Crime (Emergency Ordinance) 1969 s 3*

*Evidence — Burden of proof — Wrongful detention — Whether defendants proved that arrest and detention of plaintiff in accordance with law — Whether plaintiff had discharged burden of proving mala fide by defendants — Public Order and Prevention of Crime (Emergency Ordinance) 1969 s 3*

*Tort — False imprisonment — Arrest — Plaintiff arrested for alleged robberies and detained in various police stations and detention centres for 826 days — Whether plaintiff arrested and detained lawfully — Whether periods of detention legal and for valid reasons — Limitation — Whether plaintiff's claim for damages in respect of his detention from 26 July 2004–5 November 2004 was time barred — Whether plaintiff failed to name tortfeasor — Damages — Whether plaintiff entitled to damages — Exemplary damages — Whether plaintiff should be awarded exemplary and aggravated damages*

On 16 February 2003, the plaintiff was arrested by the police in Ipoh to investigate two alleged robberies that had taken place in Ipoh. On 26 February 2003, the plaintiff and another person were charged for the alleged robberies. However, after investigations the Deputy Public Prosecutor in charge applied for a discharge not amounting to an acquittal and closed the case file relating to these charges with the comment no further action. In the meantime, while the order for DNAA was still pending, the plaintiff was arrested and taken to the Ipoh Police Special Branch lock up on 26 July 2004 for questioning, in connection with a RM1m robbery that took place in Seremban. He was detained in Ipoh until 30 July 2004 and then in Seremban from 31 July 2004 until 9 August 2004 by the Seremban police. After ten days of investigation the

plaintiff was given police bail but not physically released. Instead, on 10 August 2004, he was handed over to the KL police for investigation into certain robberies. Although the police agreed that the plaintiff was not involved in any criminal cases and there was no evidence against him, the KL police handed him over to the Shah Alam police, who detained him from 22 August 2004–27 August 2004. From 27 August 2004–6 September 2004 the plaintiff was detained in police stations in Seremban, Johor Bahru and Malacca. The plaintiff was then arrested under s 3(1) of the Public Order and Prevention of Crime (Emergency Ordinance) 1969 ('POPOC') by the second defendant, an inspector of the *Cawangan* D7 Seremban, upon the instruction of the Ketua Police Negara ('the third defendant') and detained from 8 September 2004 till 5 November 2004. On 5 November 2004, the plaintiff was served with a detention order ('the first DO'), which was based on five alleged charges, and sent to Simpang Renggam Detention Centre for a period of two years. The advisory board ('AB') appointed under the POPOC found three of the five charges baseless and immediately dropped the same and proceeded with the remaining two. The plaintiff denied all the charges. While waiting for the recommendation of the AB, the plaintiff filed a writ of habeas corpus. After hearing the plaintiff's application the High Court declared the first DO invalid and ordered his immediate release. When the writ of habeas corpus order was served on the first defendant on 2 March 2006, the plaintiff was taken to the Seremban Police HQ and detained for about 28 days. On 29 March 2006, the plaintiff was served with a new DO ('the second DO'), which was based on the same two charges cited in the first DO. The plaintiff then filed a second writ of habeas corpus. However, when the fourth defendant served the plaintiff with a suspension of the DO ('SDO'), the plaintiff withdrew the second habeas corpus application. The plaintiff was then restricted to Jerantut, Pahang from 28 July 2006 for a period of seven months. The plaintiff filed an originating summons to challenge the restriction order dated 27 July 2006. The Johor Bahru High Court declared the second DO and the RO invalid and ordered the immediate release of the plaintiff. This was the plaintiff's claim for general damages against the defendants for his unlawful arrest and detention from the period 26 July 2004 to 28 October 2006. The plaintiff contended that he was unlawfully and unconstitutionally deprived of his liberty as from 26 July 2004 until his release on 19 October 2006. The defendants contended that the plaintiff was not entitled to the damages he claimed as the various periods of his detention were lawful and in accordance with the relevant laws. The defendants also submitted that the plaintiff's claim for damages in respect of his detention from 26 July 2004 until 5 November 2004 was time barred.

**Held**, allowing the plaintiff's claim:

(1) The defendants had not adduced any evidence to show that the plaintiff's arrest and detention at various police stations from 26 July 2004 until 7 September 2004 was legal and for valid reasons. Further, no court

documents or remand records were adduced to prove that the plaintiff was detained in accordance with relevant laws (see para 17(b)). A

(2) The plaintiff's arrest under s 3(3) POPOC and further police detention from 8 September until 5 November 2004 was unlawful and wrongful due to non-compliance with ss 3(1), (3) and the provisos (a),(b) and (c) of s 3(3) of the POPOC. The cardinal principle is that every detention is unlawful and the burden is on the detaining authority to justify it. In the present case, although the second defendant testified that he had an order to arrest the plaintiff from the Timbalan OCCI, the order to arrest was not produced in court as an exhibit. Neither was the OCCI called to confirm the order to arrest. In the circumstances, the defendants had failed to prove that the arrest was in accordance with the law and their actions clearly infringed art 5(1) of the FC, which guaranteed liberty of the person (see para 18(d)–(e)). B C

(3) The appellant's detention pursuant to the first DO was unlawful and wrongful because it was issued based on events which appeared to be baseless and unrelated to the plaintiff. The second defendant's testimony showed that three of the five charges upon which the first DO was based could not be substantiated with confirmation of the events and/or victims. The case file relating to the remaining two robbery charges was also closed with the DPP's comment of no further action. In any case, this court was bound by the writ habeas corpus order that declared the first DO as null and void and unconstitutional (see para 20(a)). D E

(4) There were no new charges or new evidence used or relied upon by the second, third and fourth defendants to issue a second DO to detain the plaintiff further. The second DO was unlawful as there was no provision under the POPOC to issue a fresh DO to rearrest a person to complete the remaining balance of the detention period of the first DO, especially when that DO had been declared unlawful by the writ of habeas corpus order of the High Court. Further, the fact that the second DO was based on the same facts and grounds as the first DO meant that plaintiff was in effect punished twice for the same offence. The second DO was thus not proper, an abuse of power, unlawful, baseless and done with bad intention and 'mala fide'. The appellant's detention pursuant to the second DO was thus unlawful and wrongful (see paras 21(a) & 22(d)). F G H

(5) Based on the evidence, the plaintiff had discharged the burden of proving mala fide on the part of the defendants by showing that the defendant's actions were done without good faith and basis throughout his entire detention. As such, the detention and restriction of the plaintiff from the period 26 July 2004–28 October 2006 amounted to wrongful detention and was carried out by the defendants in bad faith, mala fide and without any basis. It also infringed arts 5, 7 and 151 of the Federal Constitution and amounted to 'double jeopardy' (see para 24(c)). I

(6) The limitation period of 36 months to commence a suit under the second limb of s 2(a) of the Public Authorities Protection Act 1948, began to run from the date the damage or injury ceased ie the date on which the plaintiff was released on 19 October 2006. Since the plaintiff's writ was filed on 10 June 2009, it was within the 36 month period. Thus the plaintiff's action was not time barred (see para 26(c)).

(7) The defendants' stand that the plaintiff had failed to comply with ss 5 and 6 of the Government Proceedings Act 1956 in failing to name the tortfeasor had no merit (see para 27).

(8) Having regard to the circumstances of the case and in particular the fact that the plaintiff had been deprived of his liberty unlawfully and wrongfully for a substantially long period of 826 days he was entitled to aggravated and exemplary damages. Thus, the plaintiff was awarded damages of RM779,500 for unlawful detention and aggravated and exemplary damages of RM50,000 and RM150,000 respectively (see paras 29 & 30).

**[Bahasa Malaysia summary**

Pada 16 Februari 2003, plaintif telah ditangkap oleh polis di Ipoh untuk disiasat mengenai dua dakwaan rompakan yang telah berlaku di Ipoh. Pada 26 Februari 2003, plaintif dan seorang lagi telah dituduh bagi dakwaan rompakan-rompakan tersebut. Walau bagaimanapun, selepas siasatan, Timbalan Pendakwa Raya ('TPR') bertugas telah memohon bagi pelepasan tidak terjumlah kepada pembebasan. Sementara itu, ketika perintah DNAA masih belum selesai, plaintif telah ditangkap dan dibawa ke penjara Polis Cawangan Khas Ipoh pada 26 Julai 2004 bagi soal siasat berkenaan rompakan RM1 juta yang berlaku di Seremban. Dia ditahan di Ipoh sehingga 30 Julai 2004 dan kemudian di Seremban pada 31 Julai 2004 sehingga 9 Ogos 2004 oleh polis Seremban. Selepas siasatan sepuluh hari, plaintif telah diberikan ikat jamin polis tetapi tidak dilepaskan secara fizikal. Sebaliknya, pada 10 Ogos 2004, dia diserahkan kepada polis Kuala Lumpur ('polis KL') bagi siasatan mengenai rompakan-rompakan tertentu. Walaupun polis bersetuju bahawa plaintif tidak terlibat dalam sebarang kes jenayah dan tiada keterangan terhadapnya, polis KL telah menyerahkannya kepada polis Shah Alam, yang telah menahannya dari 22 Ogos 2004 hingga 27 Ogos 2004. Dari 27 Ogos 2004 hingga 6 September 2004, plaintif ditahan di balai-balai polis di Seremban, Johor Bahru dan Melaka. Plaintif kemudiannya ditangkap di bawah s 3(1) Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1969 ('Ordinan') oleh defendan kedua, seorang inspektor di Cawangan D7 Seremban, berdasarkan arahan Ketua Polis Negara ('defendan ketiga') dan ditahan dari 8 September 2004 hingga 5 November 2004. Pada 5 November 2004, plaintif telah diberikan perintah tahanan ('PT pertama'), yang mana adalah berdasarkan lima tuduhan yang didakwa, dan dihantar ke Pusat Tahanan Simpang Renggam bagi tempoh dua tahun. Lembaga Penasihat

('LP') yang ditubuhkan di bawah Ordinan mendapati bahawa tiga daripada lima pertuduhan tersebut, tidak berasas dan seterusnya menggugurkan ketiga-tiga kes tersebut dan meneruskan dengan dua lagi. Plaintif menafikan kesemua pertuduhan. Sementara menanti cadangan daripada LP, plaintif memfailkan writ habeas corpus. Selepas membicarakan permohonan plaintif, Mahkamah Tinggi mengisytiharkan PT pertama sebagai tidak sah dan memerintahkan pembebasannya segera. Apabila writ habeas corpus tersebut disampaikan kepada defendan pertama pada 2 Mac 2006, plaintif dibawa ke Ibu Pejabat Polis Seremban dan ditahan selama kira-kira 28 hari. Pada 29 Mac 2006, plaintif disampaikan dengan PT baru ('PT kedua'), yang mana adalah berdasarkan dua pertuduhan yang disebut dalam PT pertama. Plaintif kemudiannya memfailkan writ habeas corpus kedua. Walau bagaimanapun, apabila defendan keempat menyerahkan plaintif kepada penggantungan PT ('PPT'), plaintif menarik balik permohonan habeas corpus kedua. Plaintif kemudiannya disekat dari Jerantut, Pahang dari 28 Julai 2006 bagi tempoh tujuh bulan. Plaintif memfailkan saman pemula untuk mencabar perintah penggantungan bertarikh 27 Julai 2006. Mahkamah Tinggi Johor Bahru mengisytiharkan PT kedua dan RO sebagai tidak sah dan memerintahkan pelepasan segera plaintif. Ini adalah tuntutan plaintif bagi ganti rugi am terhadap defendan-defendan bagi tangkapan dan penahanan salah bermula dari tempoh 26 Julai 2004 hingga 28 Oktober 2006. Plaintif menghujahkan bahawa dia telah dinafikan kebebasan secara salah dan tidak berlembagaan dari 26 Julai 2004 hingga pelepasannya pada 19 Oktober 2006. Defendan-defendan menghujahkan bahawa plaintif tidak berhak ke atas ganti rugi yang dituntutnya kerana tempoh tahanan yang pelbagai tersebut adalah sah dan selaras dengan undang-undang yang relevan. Defendan-defendan juga menghujahkan bahawa tuntutan plaintif bagi ganti rugi penahanannya dari 26 Julai hingga 5 November 2004 dihadkan oleh masa.

**Diputuskan**, membenarkan tuntutan plaintif:

(1) Defendan-defendan tidak mengemukakan sebarang keterangan untuk menunjukkan bahawa penangkapan dan penahanan plaintif di pelbagai balai polis dari 26 Julai hingga 7 September 2004 adalah sah dan bagi sebab-sebab yang sah. Selanjutnya, tiada dokumen-dokumen mahkamah atau rekod-rekod reman yang dikemukakan untuk membuktikan bahawa plaintif ditahan selaras dengan undang-undang relevan (lihat perenggan 17(b)).

(2) Penangkapan plaintif di bawah s 3(3) Ordinan dan penahanan lanjut oleh polis dari 8 September hingga 5 November 2004 adalah tidak sah dan salah kerana ketidakpatuhan ss 3(1), (3) dan proviso-proviso (a), (b) dan (3)(c) Ordinan. Prinsip asas adalah bahawa setiap penahanan adalah tidak sah dan beban terletak pada pihak berkuasa yang menahan untuk menjustifikasikannya. Dalam kes ini, walaupun defendan kedua memberi keterangan bahawa dia mempunyai perintah untuk

menangkap plaintif daripada Timbalan OCCI, tetapi perintah untuk menahan tidak dikemukakan di mahkamah sebagai bukti. OCCI juga tidak dipanggil untuk mengesahkan perintah untuk menahan. Dalam hal keadaan sedemikian, defendan-defendan telah gagal membuktikan bahawa penangkapan tersebut adalah selaras dengan undang-undang dan tindakan-tindakan mereka jelas melanggar perkara 5(1) Perlembagaan Persekutuan, yang mana menjamin kebebasan seseorang (lihat perenggan 18(d)–(e)).

(3) Penahanan perayu di bawah PT pertama adalah menyalahi undang-undang dan merupakan penahanan salah kerana ia dikeluarkan berdasarkan kejadian-kejadian yang kelihatan tidak berasas dan tidak berkaitan dengan plaintif. Keterangan defendan kedua menunjukkan bahawa tiga daripada lima pertuduhan yang mana PT pertama diasaskan tidak boleh dikuatkan dengan disahkan oleh kejadian-kejadian dan/atau mangsa-mangsa. Fail kes berkenaan dua pertuduhan rompakan telah ditutup dengan komen tiada tindakan lanjut oleh TPR. Dalam apa jua keadaan, mahkamah ini terikat dengan perintah writ habeas corpus yang mengisytiharkan PT pertama sebagai batal dan tidak sah dan tidak berpelembagaan (lihat perenggan 20(a)).

(4) Tiada pertuduhan atau keterangan baru yang diguna pakai atau disandarkan oleh defendan kedua, ketiga dan keempat untuk mengeluarkan PT kedua untuk menahan plaintif selanjutnya. PT kedua adalah haram kerana tiada peruntukan di bawah Ordinan untuk mengeluarkan PT baru untuk menangkap semula seseorang untuk melengkapkan baki tempoh tahanan PT pertama, khasnya apabila PT tersebut telah diisytiharkan sebagai haram oleh perintah writ habeas corpus Mahkamah Tinggi. Selanjutnya, fakta bahawa PT kedua adalah berdasarkan fakta-fakta dan alasan-alasan yang sama dengan PT pertama bermakna plaintif secara efektifnya dihukum sebanyak dua kali bagi pertuduhan yang sama. PT kedua adalah dengan itu tidak wajar, satu salah guna kuasa, salah, tidak berasas dan dilakukan dengan niat jahat dan mala fide. Penahanan perayu di bawah PT kedua adalah dengan itu menyalahi undang-undang dan salah (lihat perenggan 21(a) & 22(d)).

(5) Berdasarkan keterangan, plaintif telah dilepaskan daripada beban membuktikan mala fide bagi defendan-defendan dengan menunjukkan bahawa tindakan-tindakan defendan telah dilakukan tanpa niat suci dan tanpa asas sepanjang penahanannya. Dengan itu, penahanan dan sekatan plaintif dari tempoh 26 Julai 2004 hingga 28 Oktober 2006 terjumlah kepada penahanan salah dan dijalankan oleh defendan-defendan dengan niat jahat, mala fide dan tanpa sebarang asas. Ia juga melanggar perkara-perkara 5, 7 dan 151 Perlembagaan Persekutuan dan terjumlah kepada 'double jeopardy' (lihat perenggan 24(c)).

(6) Tempoh had masa selama 36 bulan untuk memulakan tindakan di bawah

cabang kedua s2(a) Akta Perlindungan Pihak Berkuasa Awam 1948 bermula dari tarikh kecederaan bermula iaitu tarikh plaintif dilepaskan pada 19 Oktober 2006. Oleh kerana writ plaintif difailkan pada 10 Jun 2009, ia adalah dalam tempoh 36 bulan. Oleh itu, tindakan plaintif tidak dihadkan oleh masa (lihat perenggan 26(c)).

(7) Hujahan defendan-defendan bahawa plaintif gagal mematuhi ss 5 dan 6 Akta Prosiding Kerajaan 1956 dalam kegagalannya menamakan pelaku tort adalah tidak bermerit (lihat perenggan 27).

(8) Selepas mengambil hal-hal keadaan kes dan khususnya fakta bahawa plaintif dinafikan kebebasannya secara menyalahi undang-undang dan salah bagi tempoh panjang yang substansial selama 826 hari, dia berhak ke atas ganti rugi keterlaluan dan teladan. Oleh itu, plaintif diawardkan dengan ganti rugi berjumlah RM779,500 bagi penahanan haram dan ganti rugi keterlaluan dan teladan masing-masing berjumlah RM50,000 dan RM150,000 (lihat perenggan 29 & 30).]

**Notes**

For cases on arrest, see 12(1) *Mallal's Digest* (4th Ed, 2103 Reissue) paras 845–851.

For cases on personal liberty, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2546–2561.

**Cases referred to**

*A v Bottrill* [2003] 1 AC 449, PC (consd)

*Abdul Ghani Haroon v Ketua Polis Negara and another application* [2001] 2 MLJ 689; [2001] 2 CLJ 709, HC (refd)

*Andrew s/o Thamboosamy v Superintendent of Pudu Prisons, Kuala Lumpur* [1976] 2 MLJ 156, FC (refd)

*Badrul Zaman PS Md Zakariah v Superintendent, Preventive Detention Centre, Kamunting & Ors* [2011] 4 CLJ 873, HC (folld)

*Cassel & Co Ltd v Broome and another* [1972] AC 1027, HL (consd)

*Fong Ooi Lee lwn Ketua Polis Trafik, Wilayah Persekutuan dan lain-lain* [2000] 2 MLJ 524; [1999] 8 CLJ 179, HC (consd)

*Ibrahim bin Mohideen Kutty v Timbalan Menteri Dalam Negeri & Ors* [2003] 5 MLJ 294; [2003] 6 CLJ 144, HC (folld)

*Karpal Singh s/o Ram Singh v Menteri Hal Ehwal Dalam Negeri Malaysia & Anor* [1988] 1 MLJ 468 (refd)

*Kerajaan Malaysia v Yong Moi Sin* [2010] 3 MLJ 862, HC (consd)

*Kuan Kwai Choi v Ak Zaidi bin Pg Metali* [1993] 2 MLJ 207, HC (consd)

*Mak Koon Yong & Anor v Municipal Councillors, Malacca* [1967] 1 MLJ 256 (folld)

*Pengarah Hospital Selayang & Ors v Ahmad Azizi bin Abdullah James & Ors* [2012] 5 MLJ 679; [2012] 5 AMR 115, CA (folld)

*Rookes v Barnard* [1964] 1 AC 129, HL (consd)

A *Roshairee bin Abdul Wahab v Mejar Mustafa bin Omar & Ors* [1996] 3 MLJ 337, HC (folld)
*SK Tangakaliswaran Krishnan v Menteri Dalam Negeri, Malaysia & Ors* [2009] 6 CLJ 705, FC (refd)
*Shaaban & Ors v Chong Fook Kam & Anor* [1969] 2 MLJ 219, PC (consd)
B *Tan Hock Chan v Menteri Dalam Negeri, Malaysia & Ors* [1994] 1 MLJ 60, HC (folld)
*Tan Kay Teck & Anor v The Attorney-General* [1957] 1 MLJ 237 (consd)
*Thompson v Commisioner of Police of the Metropolis Hsu v Same* [2000] 2 MLJ 524, CA (consd)
C

**Legislation referred to**

Federal Constitution arts 5, 5(1), 7, 151
Government Proceedings Act 1956 ss 5, 6
D Internal Security Act 1960 (repealed by Security Offences (Special Measures) Act 2012) s 8(1)
Penal Code s 395
Public Order and Prevention of Crime (Emergency Ordinance) 1969 ss 3(1), (3), (a), (b), (c), 4(1), 6, 7, 7A(3)(a)
E Public Authorities Protection Act 1948 s 2(a)
Rules of the High Court 1980 O 18 r 19

*Ebrina bt Zubir (Subramaniam a/l M Govindan Nair with her) (Maniam Nair & Co) for the plaintiff.*
F *Zureen Elina Mohd Dom (Nurul Ainy Yahaya with her) (Senior Federal Counsel, Attorney General's Chambers) for the defendant.*

**Lee Heng Cheong JC:**

THE INTRODUCTION

G

**[1]** The plaintiff's claim against the defendants is for the plaintiff's unlawful arrest, unlawful detention and unlawful restriction on the following dates:

(a) from 26 July–8 September 2004 at various police stations;

H

(b) from 8 September–5 November 2004 at Seremban Police Headquarters ('IPK Seremban');

(c) from 5 November 2004–2 March 2006 at Simpang Renggam Detention Centre;

I

(d) from 2–29 March 2006 at Kluang District Police Station and Seremban Police Headquarters;

(e) from 30 March–27 July 2006 at the Simpang Renggam Detention Centre; and

(f) from 27 July–28 October 2006 for being under restriction order at Daerah Jerantut Pahang.

**[2]** The plaintiff also claims for the following consequential reliefs namely general damages (aggravated damages, exemplary damages and punitive damages).

**[3]** In essence the defendants' defences were, inter alia, that the various periods of detention of the plaintiff was lawful and in accordance with the relevant laws, that the plaintiff's claim with regards to his first and second detention is barred by limitation period as stipulated under s 2(a) of the Public Authorities Protection Act 1948 ('PAPA 1948') and the plaintiff must identify the actual person alleged to have committed the tort or wrongful act and so he must strictly prove that such person had committed the tort or wrongful act.

THE AGREED ISSUES TO BE TRIED

**[4]** The followings are the agreed issues to be tried:

(a) whether the plaintiff was arrested and detained/restricted unlawfully and without any basis on the following dates:

  (i) from 26 July–8 September 2004 at various police stations;

  (ii) from 8 September–5 November 2004 at Seremban Police Headquarters (IPK Seremban);

  (iii) from 5 November 2004–2 March 2006 at Simpang Renggam Detention Centre;

  (iv) from 2–29 March 2006 at Kluang District Police Station and Seremban Police Headquarters;

  (v) from 30 March–27 July 2006 at the Simpang Renggam Detention Centre; and

  (vi) from 27 July–28 October 2006 for being under restriction order at Daerah Jerantut Pahang;

(b) whether the detention and restriction of the plaintiff as above amounted to wrongful detention/restriction and was carried out by the respondents in bad faith 'Mala Fide' without any basis and infringes arts 5, 7 and 151 of the Federal Constitution and amounting to 'Double Jeopardy'?

(c) whether the rearrest and detention of the plaintiff on the 2 March 2006 by the police and the further detention of the plaintiff by virtue of the second detention order from 30 March–27 July 2006 basing from the same two old facts of the first detention order is not proper, abuse of power, unlawful, baseless and done with bad intention and 'mala fide'?

(d) whether the plaintiff's action against the defendant is estopped by limitation under the s 2(a) of the Public Authorities Protection Act 1948?

(e) whether the plaintiff fails to comply with ss 5 and 6 of the Government Proceedings Act 1956 in failing to name the tort feasor?

(f) whether the detention and restriction order issued by the fourth defendant is in accordance with the law? and

(g) whether the plaintiff is entitled to damages as pleaded in the statement of claim?.

CONSIDERATION OF THE AGREED ISSUES

**[5]** Whether the plaintiff was arrested and detained/restricted unlawfully and without any basis on the following dates:

(a) from 26 July–8 September 2004 at various police stations;

(b) from 8 September–5 November 2004 at Seremban Police Headquarters (IPK Seremban);

(c) from 5 November 2004–2 March 2006 at Simpang Renggam Detention Centre;

(d) from 2–29 March 2006 at Kluang District Police Station and Seremban Police Headquarters;

(e) from 30 March–27 July 2006 at the Simpang Renggam Detention Centre; and

(f) from 27 July–28 October 2006 for being under restriction order at Daerah Jerantut Pahang.

**[6]** Before dealing with this agreed issue, it would be pertinent to state the chronology of events. On 16 February 2003, the plaintiff was arrested by Ipoh police for investigation under s 395 of the Penal Code ie alleged robbery in Ipoh, Perak. On the 26 February 2003, the plaintiff together with one other person was charged at Ipoh Session Court for the alleged robbery on various charges. On the 15 April 2004, the prosecution applied to the court for an order of DNAA for Case No 61–2 of 2003. While for Case No 61–1 of 2003 the prosecution applied to the court for an order of DNAA on 26 August 2004.

**[7]** On the 26 July 2004, while the said Case No 61 January 2003 was pending, the plaintiff was called up by the Alor Star police and he surrendered to Alor Star police on 26 July 2004. The plaintiff was arrested and taken to the Ipoh Police Special Branch lock up for five days from 26–30 July 2004. The

plaintiff was being questioned in connection with a RM1m robbery case at a Korean factory (Samsung) at Seremban.

**[8]** The police proceeded to detain the plaintiff under the instruction and supervision of the third defendant which was carried out by the fifth defendant's agents including the second defendant's. The plaintiff was taken to various police stations namely from Seremban to Kuala Lumpur, to Shah Alam, to Seremban, to Johor Bahru and to Melaka. The police detained him from 26 July–8 September 2004. 'I noted the mala fide' actions of the police in the following manner and events:

(a) from 31 July–9 August 2004, the plaintiff was detained by Seremban Police (Major Crime Division) and was investigated and assaulted by the major crime officers. After ten days of investigations, the plaintiff was given a police bail only on documentation but physically he was not released. He was then handed over to Kuala Lumpur police on 10 August 2004;

(b) from 10–21 August 2004 the plaintiff was in the custody of the Kuala Lumpur police and detained at IPK Kuala Lumpur for investigation in respect of the robbery cases. The police agreed that the plaintiff was not involved in any criminal cases and there was no evidence against him. On the 21 August 2004, the plaintiff was handed over to Shah Alam police;

(c) from 22–27 August 2004, the plaintiff was detained at CID HQ, Ibu Pejabat Polis Shah Alam. The plaintiff was investigated for various robbery cases and again the investigation revealed that the plaintiff was not involved and there was no evidence against him;

(d) whilst the plaintiff was detained in IPK Shah Alam, he was taken to Ipoh Sessions Court on the 26 August 2004 and the learned DPP asked for a discharged not amounting to an acquitted DNAA for Case No 61–1 of 2003. A confirmation letter from Ipoh Sessions Court is pertaining to this found at p 5 of common bundle of documents (part 1);

(e) the plaintiff was then handed over to Seremban police on 27 August 2004. On the 28 August 2004, the plaintiff was then sent to Johor Bahru District Police Station where he was again investigated for robbery cases. Since there was no evidence against the plaintiff, then the plaintiff was handed to Melaka police;

(f) at Melaka Tengah Police Station, the plaintiff was detained from 6 September 2004 and interrogated. The plaintiff was bought to the court and was then ordered to be released. The plaintiff was only released on paper and not physically by the Melaka police as he was immediately handed over to Seremban police;

(g) the Seremban police ie the second defendant, K/Insp Vijeyan s/o

Subramaniam arrested the plaintiff and he was told that he was being arrested under s 3(1) of the Public Order & Prevention of Crime (Emergency Ordinance) 1969 ('POPOC'); and

(h) the plaintiff was then detained at IPK Seremban under the care and investigation by the second defendant who was acting on the instruction of the third defendant from 8 September–5 November 2004.

**[9]** On the 5 November 2004, the plaintiff was served with a detention order ('the first detention order'). Pursuant to the first detention order, he was sent to Simpang Renggam Detention Centre for a period of two years, effective from 5 November 2004. The first detention order was based on five alleged charges as per 'Lampiran E' which was attached to the first detention order.

**[10]** On the 4 February 2005 the advisory board appointed under the Public Order & Prevention of Crime (Emergency Ordinance) 1969 ('POPOC'), heard the plaintiff's representation. The plaintiff gave evidence and denied all the five alleged charges and also called three witnesses to support his representation. The second defendant who is the case file officer, in charge of the plaintiff's detention, was called as a witness. He testified that he cannot confirm whether the incidents as per third, fourth and fifth allegation of facts/charges actually took place as alleged, and there is no official police report lodged and there was no victims at all who have given any statement about the incidents. Upon hearing the evidence of the second defendant, the chairman of the advisory board informed the plaintiff during the hearing that charges Nos 3, 4 and 5 are baseless and they were immediately dropped. The plaintiff was told to address the advisory board, on the first and second charges only.

**[11]** While waiting for the outcome of the advisory board's recommendation, the plaintiff filed a writ of habeas corpus application at Johor Bahru High Court. On the 24 October 2005, the said High Court heard the plaintiff's application and granted a writ of habeas corpus and declared that the first detention order is not valid and the plaintiff was ordered be released immediately.

**[12]** When the writ of habeas corpus dated 24 October 2005 was served on the first defendant on the 2 March 2006 and the following events took place on the 2 March 2006:

(a) at about 9am that morning, the plaintiff was told by the warden of the detention camp that his counsel had served a writ of habeas corpus at the main gate. The plaintiff was then taken out of his cell and brought to the record office which is about almost 1km away from the main gate. The plaintiff was then kept at the said record office since 9.20am and he saw

one of the warden making calls to Bukit Aman police and to Kluang police informing them about his release;

(b) the warden at the said record office completed the documentation in respect of the plaintiff's release at about 10.30am. Thereafter, the plaintiff was told to wait and plaintiff was kept at the office till 12.30pm. At about 12.30pm the plaintiff was then taken from the record office to the main gate in a van. Upon arrival at the main gate, the plaintiff was handed over to the police officers who immediately rearrested him; and

(c) the plaintiff was then taken to Balai Polis Simpang Renggam, Kluang and was kept there till 4pm. At about 5.30pm the plaintiff was taken to the Kluang District Police Station where he was then informed that they are rearresting plaintiff under s 3(1) of the POPOC but no arrest order or documents were served.

**[13]** On 3 March 2006 at about 10.30am, the plaintiff was taken by the Seremban police and was detained at Seremban Police Headquarters (IPK Contingent Seremban) for about 28 days. On the 29 March 2006, the plaintiff was served again with a new detention order dated 28 March 2006 ('the second detention order') for a period of seven months with effect from 28 March 2006. The second detention order was based on the same previous first and second charges of the first detention order. There were no new charges nor new evidence which was used or relied upon by the second, third and fourth defendants to detain the plaintiff further. The plaintiff was then taken to the Simpang Renggam Detention Centre on the 30 March 2006 and was detained there to complete the seven months period.

**[14]** The plaintiff then filed an application for a second writ of habeas corpus at the Johor Bahru High Court. In the meantime, on 22 June 2006, the advisory board heard the plaintiff's representation. After the hearing of the advisory board on the 27 July 2006, the plaintiff was served with a suspension of the detention order ('SDO') dated 27 July 2006 which was issued by the fourth defendant. The plaintiff was then restricted to Mukim Tebing Tinggi, Daerah Jerantut, Pahang with effect from 28 July 2006 for a period of seven months. As a result of the issuance of the SDO on the 7 September 2006, the plaintiff's counsel withdrew the said second habeas corpus application.

**[15]** The plaintiff then filed an originating summon to challenge the restriction order dated 27 July 2006. The High Court heard the plaintiff's application and granted a declaration that the detention order dated 28 March 2006 and the restriction order dated 27 July 2006 are invalid and were therefore set aside. The plaintiff was ordered to be released immediately. On the 28 October 2006, the plaintiff was released when the court order dated 19 October 2006 was served on the Ketua Polis, Daerah Jerantut, Pahang.

**[16]** The plaintiff was taken back to employment by the police force ('PDRM') on the 1 November 2006.

*The detention from 26 July–7 September 2004 (44 days for arrest and detention at various police stations 'road show')*

**[17]** As regards the detention from 26 July–7 September 2004 (44 days for arrest and detention at various police stations and for 'road show'), I find this arrest and detention is unlawful and wrongful for the following reasons:

(a) on the 26 July 2004, the plaintiff was arrested, interrogated and detained for a RM1m robbery case at a Korean factory (Samsung) in Seremban. From the evidence adduced, the police could not connect him or find any evidence against him in respect of the said robbery at the said Korean factory in Seremban. Notwithstanding that the plaintiff was further detained and was taken to various police stations for 'road shows', from Seremban to Kuala Lumpur, to Shah Alam, to Seremban, to Johor Bahru and to Melaka). The plaintiff was not charged for any offences. DW2 in his testimony admitted that before 8 September 2004, the plaintiff was taken for road shows (at p 83 line 17–21 of of the notes of proceedings). DW2 in his testimony also said that he was informed by D9 officers from Negeri Sembilan Police Station that Melaka police could not connect the plaintiff to any case and there was no charge preferred against him in Melaka (p 93 line 6–14 of of the notes of proceedings); and

(b) I noted that no evidence were adduced by the defendants to show that the detention of the plaintiff throughout the said road shows, was legal and for valid reasons and furthermore no court documents or remand records were also adduced, to prove that the plaintiff was detained in accordance with the relevant laws.

**[18]** As regards the period from 8 September–5 November 2004 (59 days of police detention at IPK Seremban (under s 3(3) of the POPOC) prior to first detention order), I also find that the plaintiff's arrest by police on 8 September 2004 and detention until 5 November 2004 was unlawful and wrongful due to non compliance with s 3(1) and (3) and provisos (a), (b) and (c) to s 3(3) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 (POPOC);

(a) I find that the validity of the order made by the Minister under s 4(1) of the POPOC wholly depended on the reports complied and submitted by the second and third defendants. The case officer in charge must ensure that the report submitted to the Minister, contained facts which are true and material in order to allow the Minister to apply his mind properly before making a detention order against the plaintiff;

(b) if their reports are without basis and untrue then the order made, is bad and invalid as the Minister have acted on facts which are baseless and/or untrue;

(c) s 3(1) to s 3(3) which is the preamble to the issuance of the detention order read together with s 4(1) of the POPOC read:

> … Section 3(1) and 3(3) POPOC reads:
>
> 3.1 Power to detain suspected persons
>
> (1) Any police officer may without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe that there are grounds which would justify his detention under Section 4(1) …
>
> … Section 4(1) POPOC provides:
>
> 4.1 Power to order detention
>
> 1 (1) If the Minister is satisfied that with a view to preventing any person from acting in any manner prejudicial to public order it is necessary that that person should be detained, or that it is necessary for the suppression of violence or the prevention of crimes involving violence that that person should be detained, the Minister shall make an order (hereinafter referred to as a 'detention order') directing that that person be detained for any period not exceeding two years …

(d) the cardinal principle is that every detention is prima facie unlawful and the burden of proof is on the detaining authority to justify it. This is laid down in *Abdul Ghani Haroon v Ketua Polis Negara and another application* [2001] 2 MLJ 689 at p 697; [2001] 2 CLJ 709 at p 717 (HC) para (b) and (c) and *SK Tangakaliswaran Krishnan v Menteri Dalam Negeri, Malaysia & Ors* [2010] 1 MLJ 149 at p 153; [2009] 6 CLJ 705 at p 710 (FC) where the court held:

> … [5] … It is settled law that on an application for habeas corpus the burden of satisfying the court that the detention is lawful lies thoughout on the detaining authority. See, *Chng Suan Tze v The Minister of Home Affairs & Ors and Other Appeals* [1989] 1 MLJ 69; [1998] 1 LNS 162. In *Mohinuddin v District Magistrate, Beed* AIR [1987] SC 1977, the Supreme Court of India observed as follows in the context of article 22 of the Indian Constitution from which is drawn our art 151:
>
> *It is enough for the detenu to say that he is under wrongful detention, and the burden lies on the detaining authority to satisfy the court that the detention is not illegal or wrongful and that the petitioner is not entitled to the relief claimed. This court on more occasions than one has dealt with the question and it is now well settled that it is incumbent on the State to satisfy the court that the*

> *detention of the petitioner/detenu was legal and in conformity not only with the mandatory provisions of the Act but also strictly in accord with the constitutional safeguards embodied in Art 22(5)* …
>
> [6] So too here. It is for the respondents to prove that the constitutional and statutory safeguards embodied in art 151 and s 6(1) were strictly complied with…. (Emphasis added.)

(e) In the present case, even though DW2 (the second defendant herein) in his testimony stated that he obtained an order to arrest the plaintiff under s 3(1) of the POPOC from Tuan Huzir, the *Timbalan* OCCI, I noted however that the said order to arrest was not produced in court as an exhibit nor was the said Tuan Huzir called to confirm this. Thus I find that the defendants have failed to prove that the arrest was in accordance with the law and therefore the actions by the defendants clearly infringed art 5(1) of the Federal Constitution which states:

> … 5 Liberty of the person (1) No person shall be deprived of his life or personal liberty save in accordance with the law …

(f) in *Andrew s/o Thamboosamy v Superintendent Of Pudu Prisons, Kuala Lumpur* [1976] 2 MLJ 156 at p 158 (FC), the court held:

> … With respect, we agree that any form of detention does violence to s 5(1) of the Constitution which reads:
>
> (1) No person shall be deprived of his … personal liberty save in accordance with law …
>
> and hence *power given by law to detain must be construed strictly and in cases of doubt or ambiguity the court should lean in favour of the subject* ….
>
> (Emphasis added.)

**[19]** I also noted that even though the second defendant ('DW2') brought to the attention of the officers at D7 Bukit Aman that he did not have any evidence as regards the robberies of the three moneychangers ie either in form of statements or confirmation from the victims and/or in the form of police reports or in the form of any kind of reports from the three Police Districts concerned, the officers of the third defendant at Bukit Aman, Kuala Lumpur still proceeded to order the arrest of the plaintiff under s 3(1) of the POPOC (please refer to p 92 line 26–30 of the notes of proceedings). This clearly showed that the Bukit Aman officers acted unlawfully in ordering the arrest and detention of the plaintiff.

*The period from 6 November 2004–1 March 2006 (483 days of detention at Simpang Renggam Prison pursuant to the first detention order)*

**[20]** As regards the period from 6 November 2004–1 March 2006 (483 days of detention at Simpang Renggam Prison pursuant to the first detention order), I also find this period of detention to be unlawful and wrongful for the following reasons:

(a) since I have found that the first detention order is unlawful as, inter alia, the investigation reports submitted to the Minister under s 3(3)(c) of the POPOC are based on events which appeared to be baseless or unrelated to the plaintiff and since the Minister have acted and applied his subjective mind on these tainted unsubstantiated reports, then, the order made by the Minister is null and void;

(b) further based on the testimony of the second defendant (DW2), I find that DW2's testimony, in fact supported the plaintiff's case for the following reasons:

(i) DW2 who is the D7 officer attached to IPK Negeri Sembilan, agreed that he used the Ipoh cases to build his case file on the plaintiff in Seremban and he also said he prepared the plaintiff's case file and forwarded his report to Bukit Aman on 27 August 2004, to get their permission to arrest the plaintiff, for two cases reported at Ipoh and three cases which were not reported in Kuala Lumpur, Shah Alam and Johor Bharu. DW2 further agreed that in Ipoh, there are D7 officers who are doing preventive cases and they themselves did not open up case file or take preventive action for these two incidents and the files have been closed with the comments 'No Further Action';

(ii) he further said that in so far as the two cases in Ipoh, namely the Jalan Lim Boo Seng and Jalan Yang Kalsom cases, are concerned, the cases was minuted as NFA (no further action) and KUS (*kemas untuk simpan*) by the deputy public prosecutor in charge after investigations (p 88 line 10–17 of of the notes of proceedings);

(iii) for the three cases which were not reported in Kuala Lumpur, Shah Alam and Johor Bharu respectively, DW2 in his evidence agreed in cross-examination that he did not receive any reports or statements from the police in Kuala Lumpur, Shah Alam and Johor Bharu, relating to any crime alleged to have been committed by plaintiff (see p 85 lines 16–20 of of the notes of proceedings). DW2 also agreed that the said three cases, relating to the alleged robberies of the moneychangers were not reported but he just prepared his reports, based on the statements of suspects which were allegedly recorded by someone else;

(iv) I noted that when DW2 was challenged during cross-examination, he admitted that he did not personally check and verified with the OCPD of Sentul or the relevant police officers in charge at Sentul Police District and also with the relevant police officers at Shah Alam and Johor Bharu Police Districts whether such incidents were reported by the moneychangers. DW2 further stated that he was not sure where these three incidents actually took place;

(v) further DW2 agreed that he also cannot confirm whether in all these three cases, there are victims who had actually lost their money due to robberies (p 92 lines 8–10 of the notes of proceedings). Other than what the other suspects allegedly stated in their statements, he cannot affirmatively confirm that these three crimes actually took place (p 92, lines 20–23 of the notes of proceedings). DW2 also agreed that he was called to attend an internal enquiry held by the advisory board 'lembaga penasihat' on 4 February 2005. He confirmed testifying that there were no police reports, victim or complainant in the third to fifth allegation of facts at p 10 of the common bundle of documents;

(vi) I noted that notwithstanding DW2's report to the Bukit Aman officers that the two cases in Ipoh had been NFA by the prosecution and the other three cases could not be substantiated with confirmation of the events and or victims, the Bukit Aman police still proceed to prepare and/or forward the reports relating to the plaintiff to the Minister, who acted on it and issued the first detention order under s 4(1) of the POPOC (p 95 line 14–28 of of the notes of proceedings);

(vii) DW2 in his testimony admitted that in the three charges namely the third, fourth and fifth charges/allegation of facts, there are no specific dates of the alleged commission of the alleged offences; and

(viii) finally I am guided and bound by the said writ habeas corpus order dated 24 October 2005, issued by Johor Bahru High Court declaring that the first order of detention by the Minister as null and void and unconstitutional and since there was no appeal lodged by the respondent in respect of the said writ of habeas corpus order. I am also guided by the case of *Badrul Zaman PS Md Zakariah v Superintendent, Preventive Detention Centre, Kamunting & Ors* [2011] 4 CLJ 873.

*The period from 2–29 March 2006 (28 days of detention in Kluang District police and later detention at IPD Seremban 2 lock up prior to second detention order)*

**[21]** As regards the period from 2–29 March 2006 (28 days of detention in

Kluang District police and later detention at IPD Seremban lock up prior to the second detention order), I also find that this period of detention is unlawful and wrongful for the following reasons:

(a) I find even though the said writ of habeas corpus order was issued for his immediate release, to the relevant defendant, the plaintiff was however not released, in compliance with the said writ of habeas corpus order and instead he was handed over to the Kluang police within the Simpang Renggam Prison where he was rearrested which rearrest was not challenged by the defendants;

(b) the said writ of habeas corpus order from the Johor Bahru High Court ordered the immediate release of the plaintiff which was clearly not complied. Further there is no provision under POPOC which empowers the police, to rearrest a person on the same grounds. DW1 in his testimony testified that the power to rearrest is not specified (p 46 lines 1–6 of of the notes of proceedings). DW1 in his evidence also agreed that under POPOC, the Minister has power only to extend a detention order on the same ground or fresh ground and/or the same ground (p 46 lines 14–17 of of the notes of proceedings);

(c) DW1 in his evidence further stated that there were no new evidence and/or fresh allegations of facts which were forwarded to the Minister in respect of the second detention order. However, DW1 in his evidence during examination-in-chief, said that one of the reasons why the plaintiff was rearrested was because DW1 felt that the plaintiff have not completed the rehabilitation process and the plaintiff should be rearrested and should complete the rehabilitation process. Under cross-examination, DW1 agreed that the entire rehabilitation process at the detention centre is under the purview of the rehabilitation centre and the advisory board and not the police (please see p 62 lines 18–21 of the notes of proceedings). I find that there is no provision in the POPOC which empowers the police to rearrest anyone and to obtain an order of detention under s 4(1) of the POPOC, for completion of the rehabilitation process. This clearly is an abuse of power by the second, third and fourth defendants in reinvoking ss 3(1) and 4(1) of the POPOC, to rearrest the plaintiff. Thus, I find that the rearrest is wrong, bad and illegal in law. The power to review and determine the extent of rehabilitation is vested on the first defendant and advisory board ( ss 6–7 of the POPOC] and not with the police; and

(d) even though DW1 testified that the rearrest order was issued by SAC II, Sidin bin Abdul Karim (Ketua Penolong Pengarah D7, JSJ Bukit Aman), SAC II Sidin bin Abdul Karim was not called to give evidence to confirm whether he gave such order to rearrest nor was the said arrest order under s 3(1) of the POPOC, produced to show that there was in fact a rearrest order.

*The period from 30 March–26 July 2006 (119 days of detention in Simpang Renggam Prison pursuant to second detention order)*

**[22]** As regards the period from 30 March–26 July 2006 (119 days of detention in Simpang Renggam Prison pursuant to second detention order, I also find that this period of detention is unlawful and wrongful for the following reasons:

(a) I am in agreement with the plaintiff's contention that under POPOC, the Minister has no power to redetain plaintiff under s 4(1) of the POPOC on the same allegations of facts (refer to s 4(1) of the POPOC) and the Minister is only empowered to extend the first detention order under the same grounds under s 7A(3)(a) of the POPOC;

(b) I noted that DW1 also agreed in cross-examination that under POPOC, the Minister has power only to extend a detention order on the same ground or fresh ground or new grounds (p 46 lines 14–17). There is no provision to issue a new or fresh detention order based on the same allegation of facts;

(c) in the plaintiff's case, both the allegation of facts for the second detention order (see p 44 of common bundle A) were similar with the first and second allegation of facts for the first detention order (see pp 9–10 of bundle A). The third, fourth and fifth allegation of facts/charges relied upon in the first detention order have been dropped. There were no new charges nor was there new evidence which was used or relied by the second, third and fourth defendants to detain the plaintiff further. The plaintiff was then taken back to the Simpang Renggam Detention Centre on 30 March 2006 and was detained there to complete the seven months period which is the remaining balance of the detention period of the first detention order. I am of the view that the second detention order was unlawful as under POPOC, there is no provision to issue a fresh detention order, to rearrest a person to complete the remaining balance of the detention period of the first detention order especially when that detention order has been declared unlawful by the Johor Bahru High Court;

(d) DW3 who testified that in respect of the second detention order, confirmed that the fourth defendant acted on the report submitted by the police (please see p 149 lines 14–16 of the notes of proceedings). The issuance of the second detention order by the Minister was based on the same report submitted by the police without new statement taken from the plaintiff and without consideration of new or fresh evidence is unlawful and wrongful. Thus this is a case where the plaintiff was

punished twice for the same 'offence' as the second detention order was made against him, based on the same facts and grounds as the first detention order;

(e) thus I find that the plaintiff's detention in Simpang Renggam Prison pursuant to Minister's second detention order dated 28 March 2006 (pp 42–44 of bundle A) was a result of an earlier unlawful detention by the police pursuant to the first detention order which was declared by the Johor Bahru High Court to be unlawful and unconstitutional. Therefore, I find that the detention in Simpang Renggam Prison from 30 March–26 July 2006 was also unlawful. I am guided by the case of *Tan Hock Chan v Menteri Dalam Negeri, Malaysia & Ors* [1994] 1 MLJ 60 (HC) at p 61 Held (2):

> … *The position in Malaysia is that if a detention of a person was a result of an earlier unlawful detention, then the second detention was also unlawful. As such, the detention of the applicant under the Act was unlawful because in effect it was a continuation of the unlawful detention.* Therefore, that was sufficient for the court to allow the present application ….
>
> (Emphasis added.)

(f) further, it was declared by the Johor Bahru High Court on 19 October 2006 that the second detention order dated 28 March 2006 and the restriction order dated 27 July 2006 is not valid, and therefore was set aside and the plaintiff was ordered to be released immediately (see the order of Johor Bahru High Court dated 19 October 2006, at pp 202–203 of bundle A).

*The period from 27 July–28 October 2006 (93 days of restriction at Daerah Jerantut, Pahang)*

**[23]** As regards the period from 27 July–28 October 2006 (93 days of restriction at Daerah Jerantut, Pahang), I find that this period of restriction is unlawful and wrongful as this restriction order was issued based on the same allegation of facts in the second detention order which restriction was unlawful and unconstitutional as declared by the Johor Bahru High Court on 19 October 2006.

**[24]** Whether the detention and restriction of the plaintiff as above amounted to wrongful detention/restriction and was carried out by the respondents in bad faith, 'mala fide', without any basis and infringes arts 5, 7 and 151 of the Federal Constitution and amounting to 'double jeopardy'?

(a) for the reasons stated above in agreed issue (a), i find that the detention

A and restriction of the plaintiff stated above amounted to wrongful detention/restriction and was carried out by the respondents in bad faith, mala fide, without any basis and infringes arts 5, 7 and 151 of the Federal Constitution and amounted to 'double jeopardy';

B (b) the case of *Karpal Singh s/o Ram Singh v Menteri Hal Ehwal Dalam Negeri Malaysia & Anor* [1988] 1 MLJ 468 at p 473 dealt with 'inter alia' the issue of mala fide as follows:

> … *Mala fide does not mean at all a malicious intention. It normally means that a power is exercised for a collateral or ulterior purpose, ie for a purpose other than the purpose for which it is professed to have been exercised.* Please see Azmi LP's dictum in Karam Singh's case. According to Ong CJ in Karam Singh's case, the words appear to have an extended meaning 'in the serious matter of depriving a citizen of his liberty without trial'. In Karam Singh's case, Ong CJ had this to say about mala fides or want of good faith (ie lacking wholly of good faith) ….
>
> (Emphasis added.)

E (c) from the evidence adduced, I find that the plaintiff have discharged the burden of proving mala fide on the part of the defendants by showing that the defendants' actions were done without good faith and basis throughout the entire arrest, detention and restriction of the plaintiff.

F **[25]** Whether the rearrest and detention of the plaintiff on the 2 March 2006 by the police and the further detention of the plaintiff by virtue of the second detention order from 30 March–27 July 2006 basing from the same two old facts of the first detention order is not proper, abuse of power, unlawful, baseless and done with bad intention and 'mala fide'?

G (a) again for the reasons stated in agreed issues (a) and (b) above, I find that the rearrest and detention of the plaintiff on 2 March 2006 by the police and the further detention of the plaintiff by virtue of the second detention order from 30 March–27 July 2006 based on the same two 'old' allegation of facts of the first detention order is not proper, an abuse of power, unlawful, baseless and done with bad intention and 'mala fide'.

H **[26]** Whether the plaintiff's action against the defendant is estopped by limitation under the s 2(a) of the Public Authorities Protection Act 1948?

I (a) the defendants contended that the plaintiff's action is time barred as it is caught by the second limb of s 2(a) of the PAPA 1948. Section 2(a) of the PAPA 1948 states:

> … *(2) Protection of persons acting in execution of statutory or other public duty …*
>
> (a) the suit, action, prosecution or proceeding shall not lie or be

instituted unless it is commenced *within thirty-six months* next after the act, neglect or default complained of *OR, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof* ….

(Emphasis added.)

(b) in the present case, the plaintiff contended that he was unlawfully and unconstitutionally, deprived of his liberty, commencing from 26 July 2004 and continues until he was released on 19 October 2006 by virtue of the said Johor Bahru High Court order dated 19 October 2006;

(c) I am of the view that the limitation period of 36 months under the second limb of s 2(a) of the PAPA 1984, began to run from the date the injury or damage ceased ie the date on which the plaintiff was released which was on 19 October 2006. Thus, since the writ was filed on 10 June 2009, it is within the 36 months period;

(d) I am guided by the following authorities:

(i) in *Mak Koon Yong & Anor v Municipal Councillors, Mallacca* [1967] 1 MLJ 256, the court held:

… Held (4) time would begin to run for the purposes of the Public Authorities Protection Ordinance from the time when the act was caused not from the time when the injury or damage ceased, *OR in the case of continuing injury or damage, when the act causing the injury or damage ceased* ….

(Emphasis added.)

(ii) in the case of *Ibrahim bin Mohideen Kutty v Timbalan Menteri Dalam Negeri & Ors* [2003] 5 MLJ 294; [2003] 6 CLJ 144, when involves an application by the first defendant therein, to strike out the plaintiff's claim pursuant to O 18 r 19 of the RHC 1980, which was premised on the plaintiff's action, being time barred under Public Authorities Protection Act 1948. The contention of the first defendant was that the plaintiff's action commenced 44 months after the detention order under s 8(1) of the Internal Security Act 1960 had been imposed upon the plaintiff on 7 July 1998, and that it was filed after the limitation period of 36 months prescribed under s 2(a) of the Public Authorities Protection Act 1948. The question that arose for determination was whether the plaintiff's action was time barred either under the first or second limb of s 2(a) of the Public Authorities Protection Act 1948. The High Court held:

… Held (1) … The first limb of s 2(a) of the Act had no application to the facts of the instant case … *The limitation period of 36 months under the second limb of s 2(a) of the Act began to run from the date the injury or damage ceased ie the date on which the plaintiff was released which was 3 January 2000* ….

(Emphasis added.)

(e) thus I find that the plaintiff's action was not time barred as time starts running only when the plaintiff is released from detention and restriction and not from the date plaintiff is arrested because it is a continuing tort.

**[27]** Whether the plaintiff fails to comply with ss 5 and 6 of the Government Proceedings Act 1956 in failing to name the tortfeasor?

(a) the defendants contended that for the plaintiff to suceed in his claims, he must identify the actual person alleged to have committed the tort or wrongful act and so he must strictly prove that such person had committed the tort or wrongful act. The defendants further contended that the plaintiff's claim against the fifth defendant will only be vicariously liable if the tort or of the wrongful act of fourth defendant's is strictly proven as per the requirements set out under the provision of ss 5 and 6 of the Government Proceedings Act 1956;

(b) the plaintiff however contended that the *Penguasa* Pusat Pemulihan Akhlak Simpang Rengam, has been named as the first defendant who has control and administration over the staff and wherein all particulars of name of officers/prison wardens who were on duty at the material time and who delayed the release of the plaintiff were within the knowledge of the first defendant and outside the knowledge of the plaintiff. Further, the plaintiff contended he has particularised the negligence/actions/defaults of the agents or servants in particular the prison wardens who perform their duties under the direction of the first defendant; and

(c) I am of the view that the plaintiff has duly complied with the requirements of ss 5 and 6 of the Government Proceedings Act 1956. I am guided and bounded by the Court of Appeal case of *Pengarah Hospital Selayang & Ors v Ahmad Azizi Bin Abdullah James & Ors* [2012] 5 MLJ 679; [2012] 5 AMR 115 where the court at held (2):

> … 2. Pursuant to ss 5 and 6 of the Government Proceedings Act 1956, the tortfeasors must be named and the government should not be the primary defendant in the suit. Since the names of the doctors who attended to the deceased were not known at the time the writ of summons and statement of claim was filed and even the defendants had not stated the names of the doctors in their statement of defence, *it would suffice to cite the first defendant as notional head of the hospital and naming the director of the hospital as first defendant is not scandalous, frivolous or vexatious and neither is it an abuse of the process of the court. The first defendant owed the deceased a duty of care, subject to proof, on behalf of the hospital for the negligent acts of all its surgeons, doctors and nurses working in that hospital individually and collectively. This duty of care is vicarious in the sense that any breach of this care by any surgeon, doctor or nurse working the hospital is vicariously imputed to the director of that hospital ….*

(Emphasis added.)

**[28]** Whether the detention and restriction order issued by the fourth defendant is in accordance to the law?

In the light of my various findings above, I find that the detention and restriction orders issued by the fourth defendant are not in accordance to the law.

**[29]** Whether the plaintiff is entitled to damages as pleaded in the statement of claim?

(a) in the light of my above findings, I find that the plaintiff is entitled to damages as pleaded in the statement of claim. Having regards to the circumstances of the case, in particular the fact that the plaintiff that he had been deprived of his liberty unlawfully and wrongfully for a substantially long period of 826 days and the invocation of the POPOC against the plaintiff for a second time after a writ of habeas corpus order was issued, was harsh and oppressive on the part of the Deputy Home Minister and this is compounded by the issuance of the second detention order which was based on similar allegation of facts as in first detention order, I am awarding aggravated and exemplary damages. I am guided by 'inter alia' the case of *Roshairee bin Abdul Wahab v Mejar Mustafa bin Omar & Ors* [1996] 3 MLJ 337; [1997] 1 CLJ Supp 39 (HC), where the court at Held [8]:

> … [9] *The objective for awarding exemplary damages is to punish the defendants and to display the court's indignant attitude towards the acts committed by the defendants.* Such damages must be restricted to situations where there are *oppressive, arbitrary or unconstitutional action* by the servants of the government …
>
> (Emphasis added.)

(b) I find further support from the case of *Fong Ooi Lee v Ketua Polis Trafik Wilayah Persekutuan dan lain-lain & Yang Lain* [2000] 2 MLJ 524; [1999] 8 CLJ 179 (HC) where the court at p 528 (MLJ); p 182 (CLJ) held:

> … Dalam kes *Rookes v Barnard* [1964] 1 All ER 367 House of Lords telah memutuskan bahawa undang-undang Inggeris membenarkan *award ganti rugi teladan (exemplary)* dalam dua keadaan iaitu:-
>
> (1) *Apabila terdapat tindakan oppressive, sewenang-wenangnya dan bertentangan dengan perlembagaan yang dilakukan oleh kakitangan kerajaan.*
>
> (2) Apabila terdapat keuntungan yang mungkin diambilkira dan dikaut

A oleh kakitangan tersebut untuk dirinya sendiri yang mungkin melebihi pampasan yang boleh dibayar kepada plaintif ….

(Emphasis added.)

B (c) in determining the damages and quantum to be awarded, I have considered, inter alia, the principles laid in the following cases:

(i) *Kerajaan Malaysia v Yong Moi Sin* [2010] 3 MLJ 862;

(ii) *Rookes v Barnard* [1964] 1 AC 129;

C (iii) *Cassel & Co Ltd v Broome and another* [1972] AC 1027;

(iv) *A v Bottrill* [2003] 1 AC 449 at p 456;

(v) *Roshairee bin Abdul Wahab v Mejar Mustafa bin Omar & Ors* [1996] D 3 MLJ 337;

(vi) *Kuan Kwai Choi v Ak Zaidi bin Pg Metali* [1993] 2 MLJ 207 (HC — Brunei);

E (vii) *Tan Kay Teck & Anor v The Attorney General* [1957] 1 MLJ 237;

(viii) *Shaaban & Ors v Chong Fook Kam & Anor* [1969] 2 MLJ 219;

(ix) Kuala Lumpur Civil No S-21–39 of 2004 between *Mohamad Ezam Bin Mohd Nor & 7 Ors v Tan Sri Norian Mai & 2 Ors*;

F (x) *Thompson v Commisioner of Police of the Metropolis Hsu v Same* [2000] 2 MLJ 524 at p 515 (Court of Appeal); and

(xi) *Fong Ooi Lee lwn Ketua Polis Trafik, Wilayah Persekutuan dan lain-lain* [2000] 2 MLJ 524; [1999] 8 CLJ 179 (HC).

G

## THE ORDER

H **[30]** In the light of my findings in respect of the above agreed issues, I find that the plaintiff has proved his case against all the defendants on a balance of probability and I grant an order in terms of the plaintiff's statement of claim. I award the following damages to the plaintiff:

I

| | |
|---|---|
| (a) Damages for unlawful detention from 26 July 2004–28 October 2006 (for 826 days) | RM779,500 |
| (b) Aggravated damages | RM50,000 |
| (c) Exemplary | RM150,000 |

*Plaintiff's claim allowed.*

Reported by Kohila Nesan